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# CRITICAL THEORY AND THE LONELINESS OF THE TAX PROF

ERIK M. JENSEN\*

This essay has two goals: to suggest why feminist and critical race commentary (what I'll call the New Criticism) is spreading in taxation and, in the course of evaluating some specific examples of the New Criticism, to discuss some dangers of that criticism.

## I. WHY THE NEW CRITICISM HAS COME TO TAX LAW

My first thesis—ultimately unprovable, I admit—is that the emergence of New Criticism writing is attributable to the fact that tax professors are often isolated within their faculties, set apart by a sense that tax law is fundamentally different from other law school subjects.<sup>1</sup> The New Criticism is an attempt to link tax scholarship with the work of other law professors and with the work of faculty on other parts of university campuses.<sup>2</sup> And it's an attempt to get notice in a way that has become increasingly common in the academy.

Tax professors are the air-fresheners of the American law school. If a tax prof tries to talk about serious tax research with a bunch of law school generalists, the room clears out instantly. We tax law types are expected to sit, without nodding off, through interminable discussions on Satanism and the First Amendment. But raise one tax question with a con law person, and he's gone: "Sorry.

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\* Professor of Law, Case Western Reserve University. I thank my colleague Jon Entin for his many helpful comments on an earlier draft. He does not necessarily subscribe to the substantive points in the essay, and he is of course not responsible for any defects that remain.

1. See Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 518 (1994) (describing two "myths," "that tax lawyers are somehow different from other lawyers" and that "tax law is somehow different from other areas of the law"); see also David A. Hyman, *Procedural Intersection and Special Pleading: Is Tax Different?*, 71 TUL. L. REV. 1729, 1744 (1997) ("Tax scholarship and administration [are] already too isolated from the insights of other areas of the law." (citing Caron, *supra*)).

2. Decidedly not including the scientists and engineers. Cf. Richard A. Posner, *The Decline of Law as an Autonomous Discipline 1962-1987*, 100 HARV. L. REV. 761, 767 (1987) ("[C]hemistry has not ceased to be an autonomous discipline just because there is more political diversity among chemists today than there was thirty years ago.").

I just remembered I have to meet with a student."<sup>3</sup>

It's not as though the con law discussions are always dealing with issues substantively more important than taxation. Whether expenditures can be currently deducted under the income tax, for example, has far more immediate consequences to many people (whether they realize it or not) than the First Amendment's treatment of Satanism.<sup>4</sup> And debates about the nature of the tax system implicate just about everything important in public policy-making. Not even Satan can plausibly claim that.

I'm not suggesting that con law isn't important, and I like con law discussions—sometimes.<sup>5</sup> My point is that con lawyers and others don't return the favor. As law professors, we ought to be able to explain our work to other intelligent people<sup>6</sup> who will make some effort to comprehend the explanations (maybe even reading an article or two to help the explanation along). But when it comes to taxation, the other folks don't even try.<sup>7</sup>

As a result, tax professors often don't talk to non-tax folks, and the typical law faculty has only a couple of tax teachers. Yes, we have telephones, and the TAXPROF bulletin board has brought quite a few tax scholars together for electronic bull sessions. Furthermore, those of us in big cities can profit from contact with the local bar. But Ma Bell, the Internet, and downtown lawyers are poor substitutes for being able to plop onto a colleague's couch and ask the "What about this?" and "Did you see that article?" questions that should make academic life so rewarding.

No one wants to talk to us, and no one except (maybe) other tax lawyers wants to read what we write. The sense of isolation from law school colleagues is exacerbated by the perceived reluctance of top student-edited law reviews, the reviews that non-tax people see, to accept tax articles. Once in a blue moon a top-ten review will take a

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3. Unspoken: "If necessary, I'll go find one in the student lounge."

4. Cf. Richard A. Epstein, *Where the Action Is: Congress, Not the Supreme Court*, WALL ST. J., Apr. 20, 1994, at A15 (noting that Congress deals with hot issues, while Supreme Court Justices are left to handle bankruptcy and American Indian law cases).

5. Personal liberties are fundamentally important, and perceptions of what the Constitution does and doesn't permit affect the moral tone of society. But, despite the great selling job con law types have done, whether someone can burn an American flag without prosecution has significance to most people only at a very abstract level.

6. Student editors: you are not supposed to challenge—or attempt to verify—this characterization of law professors.

7. Cf. Caron, *supra* note 1, at 527 ("If you pick tax work, you're already picking a job that is going to isolate you." (quoting Dan Hurley, *Why Are Young Lawyers the Loneliest People in the Profession?*, BARRISTER, Summer 1987, at 9, 10)).

serious, technical, *doctrinal* tax article, but blue moons don't seem to come around as much as they used to.<sup>8</sup>

The problem is twofold. First is the prevailing preference in legal scholarship for grand unified theories. As Paul Caron has noted, "Current trends in legal scholarship favoring 'abstract theory' at the expense of more traditional, 'practical' work may place tax professors at a competitive disadvantage with their nontax peers."<sup>9</sup> Whether Caron's competitive-disadvantage point is correct or not,<sup>10</sup> it's true that doctrinal work is not as valued in the academy as it once was.

Second, tax profs are more likely these days to bypass the student-edited reviews that other law profs publish in. Those reviews aren't the best places for tax types if they want their stuff to be published on a timely basis and to be seen by other tax specialists. But it's a dilemma. Write for generalist reviews<sup>11</sup> and you run the risk that tax professionals, especially those outside academe, won't see the articles. But if you publish in technical tax publications, your academic colleagues—those people who think you're from another planet to begin with—may characterize the work as insufficiently theoretical.<sup>12</sup> Publish in *Tax Notes*, say, and you may be slitting your throat if you hope to be promoted, or otherwise rewarded, for "scholarly" effort.<sup>13</sup>

So what do you do if you want to break out of the tax-people-are-weird box and be noticed by colleagues who aren't tax nerds?

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8. Cf. William J. Turner, *The Changing Venue for Tax (and Lots of Other) Scholarship* 3-4 (Nov. 7, 1997) (unpublished manuscript, on file with the *North Carolina Law Review*) (providing data showing the steady decline of the total percentage of all tax articles in major law reviews from approximately 12% in the 1940s to 2-3% in the last decade).

9. Caron, *supra* note 1, at 523-24 (footnotes omitted).

10. I'm not sure it is; traditionalists in many legal fields are unhappy about the extent to which abstract theory has supplanted doctrinal analysis. Cf. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) ("[M]any law schools . . . have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy.").

11. Assuming you can find one with editors brave enough to accept a tax article.

12. Without having read it, of course.

13. I wrote a short essay, only partly tongue-in-cheek, urging that *Tax Notes*, which has become the tax professional's bible, change its name to something more pompously academic, like the *Harvard Tax Journal*. See Erik M. Jensen, *Tax Notes by Any Other Name Would Smell Sweeter*, 74 TAX NOTES 641 (1997). It was an issue that struck a chord, attracting several professorial letters of support and a practitioner rebuttal. Despite its name, *Tax Notes* is great. A recent anthology of about 150 tax articles included more from *Tax Notes* than from any other publication. See *Letter from Paul Caron*, 74 TAX NOTES 966 (1997), noted in *Tax Report*, WALL ST. J., Mar. 19, 1997, at A1.

Here, finally, is my real point: you come up with some highfalutin', and therefore probably off-the-wall, theory to explain part or all of the world—a theory that is “‘brilliantly’ novel and counterintuitive rather than . . . sensible,” in Daniel Farber’s words.<sup>14</sup> In his *The Case Against Brilliance*, Farber wrote, “The . . . traits of novelty, surprise, and unconventionality that are considered marks of distinction in other fields should be considered suspect in . . . law, in which thoughtfulness may be a more important virtue.”<sup>15</sup>

By throwing in a little feminism and critical race theory, you can make waves that the legal academy is afraid not to reward and that law review editors adore. In addition, you might even get mentioned in the morning newspapers: “Professor Says Tax System Unfair to \_\_\_\_\_”—fill in the blank with your favorite “traditionally subordinated group.”<sup>16</sup> Sure, this strategy might not work to make you famous, but you’re a lot more likely to get noticed than if you carefully consider the treatment of liabilities in limited partnerships.

At a 1995 conference, Edward McCaffery (about whom more will follow) complained that issues of race, gender, and class have not been addressed very much by tax professors, who have instead “focused on more narrow and technical issues in business and financial taxation.”<sup>17</sup> Those narrow, technical issues are the stuff the rest of the legal academics don’t want to hear about, but they’re also the issues that affect the tax bar—that is, issues that students will have to address as practicing lawyers. The New Criticism is doing its part to redress the tax academy’s traditional insistence on connection with the real world of practice.

## II. THE GOOD, THE BAD, AND THE UGLY IN THE NEW CRITICISM

My second thesis is that the New Criticism isn’t taking us in a desirable direction.

I’ve used more than a little hyperbole to this point, and I don’t really mean to suggest the New Criticism is all bad. If a critic can demonstrate that the Internal Revenue Code has had unfortunate

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14. Daniel A. Farber, *Brilliance Revisited*, 72 MINN. L. REV. 367, 367 (1987).

15. Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 917 (1986).

16. See Karen B. Brown & Mary Louise Fellows, *Introduction* to TAXING AMERICA 1, 2 (Karen B. Brown & Mary Louise Fellows eds., 1996) (“What is missing from both the political and the academic debate about taxes is a serious consideration of how the tax system exacerbates marketplace discrimination against traditionally subordinated groups.”).

17. Edward McCaffery, Statement at “Taxation and the Family” Conference at Lewis and Clark Northwestern School of Law (Oct. 6, 1995), *quoted in* Rebecca S. Rudnick, *Taxation and the Family*, 69 TAX NOTES 421, 421 (1995).

effects on particular groups (call this "mild" feminism or "mild" critical race theory), we certainly ought to know that. For example, work on the Code's unhappy effects on women and families is often worthy of praise.<sup>18</sup> And materials that are marketed as New Criticism sometimes look surprisingly traditional.<sup>19</sup>

But even when New Criticism articles have merit, one might quibble about how much feminism or critical race theory helps us to understand discriminatory effects that could have been unearthed with more traditional analysis and that could have been described without the loaded, offputting language that often accompanies the New Criticism.<sup>20</sup>

And as aids to interpreting the Code as it is and as practicing lawyers must understand it, the new perspectives are often irrelevant. Is there really a feminist or critical race understanding of business taxation, which is, after all, what most tax lawyers do? Worse, the more extreme proponents of the New Criticism contribute to the idea that the Code is so morally flawed that it ought to be open to any new interpretive technique, whether or not grounded in statutory text, structure, or legislative history. In shaking the foundations of the Code, New Critics take positions—for example, that the interpretation of statutory provisions may vary depending on the gender of the interpreter—that may be inconsistent with the idea of law itself. Weakening the rule of law is helpful to no one—certainly not to the practicing bar and our students.<sup>21</sup>

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18. See, e.g., EDWARD J. MCCAFFERY, *TAXING WOMEN* (1997); Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001 (1996). But see *infra* notes 75-104 and accompanying text (discussing *Taxing Women*).

19. See, e.g., *TAXING AMERICA*, *supra* note 16. *Taxing America* is part of a series labeled *Critical America* by the New York University Press, and the purpose of the volume is to "develop an analytical framework [that] would both uncover biases in the tax law and reveal antisubordination strategies to keep the tax law from maintaining and perpetuating marketplace discrimination." Karen B. Brown & Mary Louise Fellows, *Preface* to *TAXING AMERICA*, *supra* note 16, at vii, vii. The introductory sections contain politically loaded terms like "subordination of persons," Karen B. Brown & Mary Louise Fellows, *Introduction* to *TAXING AMERICA*, *supra* note 16, at 1, 3, and a few of the 14 essays follow suit. But much of the volume is traditional in its analysis. If I were a radical and had spent my own money for the book thinking it was a guide to the revolution, I'd want a refund.

20. Cf. Jennifer Hochschild, Book Review, 7 LAW & POL. BOOK REV. 416, 417 (Sept. 1997), available at <<http://www.unt.edu/lpbr/subpages/reviews/sarat97.htm>> (reviewing RACE, LAW, AND CULTURE: REFLECTIONS ON *BROWN V. BOARD OF EDUCATION* (Austin Sarat ed., 1997)) ("[An argument s]tripped of its (to me irritating) linguistic pretensions . . . could be important as well as provocative. But I confess to having a hard time seeing the forest for all the rather florid trees.").

21. Judge Posner recently wrote that "the foundations [of traditional jurisprudence]

In this section I examine a few selected articles and books to evaluate the contributions of the New Criticism. Obviously this will not be a comprehensive examination of all aspects of the New Criticism; it can't be. Suffice it to say that in general I subscribe to the criticisms of Professor Zelenak that begin this Symposium,<sup>22</sup> but I have a few additional points to make.

A. *Critical Race Theory: Moran & Whitford*

Critical race theory ("CRT") seems to be a posture rather than a well-developed set of principles. It has been linked to storytelling (the so-called "narrative" movement), but, in *A Black Critique of the Internal Revenue Code*,<sup>23</sup> Professors Beverly Moran and William Whitford suggest that storytelling is not a necessary component of CRT: "[H]ostile critics of critical race theory have placed too much emphasis on the use of narrative, and not enough emphasis on the theory of systematic racial subordination in American society."<sup>24</sup> They state that "[o]ne main thrust of critical race theory is a belief that racial subordination is everywhere, a structural aspect of all parts of American society."<sup>25</sup>

I question the use of the term "theory" in this context.<sup>26</sup> Is there really no evidence that would convince a critical race theorist that racial subordination is not present in *one* part of American society? In any event, the "systematic-racial-subordination" thesis isn't used as a basis for testing. Instead, it provides prepackaged conclusions for any analysis.<sup>27</sup> Given the extraordinarily broad terms in which Moran and Whitford describe the "theory," I suppose it has to. If we posit that subordination is everywhere, we'll look for it—and find

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have been kicked away. Today we are all skeptics." RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 453 (1990). That's true, but only up to a point. The whole enterprise—the rule of law—should not be up for grabs.

22. See Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521 (1998).

23. Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751.

24. *Id.* at 756.

25. *Id.* at 751-52.

26. In their conclusion, Moran and Whitford instead refer to the "critical race theory tradition that racial subordination infects virtually all American institutions." *Id.* at 799 (emphasis added).

27. Cf. DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 127 (1997) ("[M]ulticulturalism . . . can defeat challenges by depriving critics of any ground from which to mount a challenge.").

it—everywhere.<sup>28</sup>

Critical race scholarship has been criticized as being “unduly abstract and ideological,”<sup>29</sup> but Moran and Whitford can’t be accused of abstractness. They focus on a number of specific Internal Revenue Code provisions—involving statutory benefits affecting wealth and wealth transfers,<sup>30</sup> homeownership,<sup>31</sup> and employment,<sup>32</sup> and the detriment of the marriage penalty<sup>33</sup>—to demonstrate how those provisions discriminate against blacks: “Our hypothesis is that deviations from the ideal of a comprehensive income tax systematically favor whites over blacks.”<sup>34</sup>

Moran and Whitford are not always clear in distinguishing between cases in which the Code has different effects because blacks and whites, on the average, are in different economic circumstances before imposition of any tax, and cases in which the Code has different effects on blacks and whites in approximately the same pre-tax economic positions. Those two flaws, assuming that both can be attributed to the Code in the first place, are hardly of the same moral

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28. And we’ll be inclined to reject, without analysis, any suggestions that the “theory” is flawed. See *id.* at 134 (discussing some critical race theorists’ characterization of opponents as being engaged in “backlash scholarship,” undeserving of any response that seeks to engage the criticism on a reasoned basis).

29. Daniel A. Farber, *Missing the “Play of Intelligence,”* 36 WM. & MARY L. REV. 147, 163 (1994).

30. Including the fair-market-value basis rule applicable for transfers of property at death, the reduced tax rate for capital gains, the exclusion from gross income of gifts received, and the basis rule (usually carryover) applicable to property transferred by gift. See Moran & Whitford, *supra* note 23, at 755 (citing I.R.C. §§ 1014, 1(h), 102, 1015 (1994 & West Supp. 1998)).

31. Including the home-mortgage-interest deduction, property-tax deduction, the (now repealed) provision permitting the rollover of gain on the sale of a principal residence, and the exclusion of gain on the sale of a principal residence. See *id.* (citing I.R.C. §§ 163(h)(1), 163(h)(2)(D), 164(a)(1), 121 (West Supp. 1998); I.R.C. § 1034, repealed by Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 312(b), 111 Stat. 788, 839).

32. Specifically Keogh plans, IRAs, pensions, and employer-provided health insurance. See *id.* (citing I.R.C. §§ 401(c), 219, 408, 401(a)(1), 501(a), 106 (West Supp. 1998)).

33. See *id.*; see also I.R.C. § 1 (West Supp. 1998) (providing different rate schedules for married persons filing jointly and unmarried persons).

34. Moran & Whitford, *supra* note 23, at 753. Moran and Whitford focus on the income tax, despite the article’s title, which seems to look to the Internal Revenue Code as a whole. The ideal is the “*Glenshaw Glass* goal of taxing all ‘accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.’” *Id.* at 759 (quoting *Commissioner v. Glenshaw Glass*, 348 U.S. 426, 431 (1955)). It’s more than a little peculiar to characterize a statutory-interpretation case as having established a “goal” to which a perfect definition of “income” should aspire. The Court in *Glenshaw Glass* was merely interpreting the language of I.R.C. § 61 defining “gross income”; it had no reason to consider the merits of that definition or the legitimacy of the statutory exclusions from income that Moran and Whitford examine.



order.

Of course it's true that high-income and high-wealth taxpayers are able to take advantage of many more deduction and exclusion provisions (and other provisions that have similar effects) than low-income and low-wealth taxpayers can. That's a trivial point,<sup>35</sup> but Moran and Whitford sometimes treat it as if it were an indictment of the Internal Revenue Code as a whole.<sup>36</sup> For example, they answer the rhetorical question "Is there a black view on income averaging?" with an emphatic "Yes."<sup>37</sup> When income averaging was available, blacks were disproportionately unable to take advantage of the concept, and blacks in general therefore had no reason to think it was very important.<sup>38</sup>

I'm not sure why the fact that relatively few blacks could use income averaging affects our analysis of whether income averaging is a good thing conceptually, and I'm bothered by an evaluative criterion that looks so blatantly to self-interest, even group self-interest.<sup>39</sup> A what's-in-it-for-me standard is not something the academy should be encouraging.<sup>40</sup>

But I'm probably being unfair to Professors Moran and Whitford in attacking the income-averaging point, which isn't the centerpiece of their article.<sup>41</sup> Their more important criticism is that some (many?) Code provisions affect blacks and whites of otherwise approximately equal economic station in different ways: "We believe that, even at the same incomes, the typical black and the typical white

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35. My favorite statement in the article is that "[t]he data on blacks and wealth tells us that blacks own very little wealth and that this lack of wealth is at least partially responsible for the continuing black/white wealth gap." *Id.* at 779.

36. I am not defending black-white income differences; I am questioning whether a Code provision that has different effects on people with different incomes is somehow morally flawed.

37. Moran & Whitford, *supra* note 23, at 752. In general, income averaging permitted taxpayers whose income had increased over a five-year period to pay the tax that would have been due if the income had been earned ratably over that period. Income averaging thus moderated the effects of a progressive tax structure.

38. *See id.* The question was asked by a tax professor in reaction to Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39.

39. I have no doubt that blacks who could make use of income averaging liked it, and whites who could not do so were less likely to be enthusiastic.

40. I recognize that some theories in political science and economics can be interpreted, at worst, as promoting self-interest to the exclusion of any conception of the public good, or, at best, as showing indifference to the quality of choices made by individuals. I'll nevertheless stand by my statement in the text.

41. But they do criticize other Code provisions on the ground that high-income people can make better use of them—for example, the exclusion for gifts. *See* Moran & Whitford, *supra* note 23, at 762-63.

lead different lives, largely as a result of the American history of racial subordination.”<sup>42</sup> That’s often because blacks and whites, on the whole, acquire different kinds of assets. Studies show “that blacks hold a higher percentage of their wealth in consumption items than whites do, and a lesser percentage in financial and investment assets.”<sup>43</sup> Apparently this asset distribution is itself evidence of racial subordination. But whether it is or not, blacks can’t take advantage of Code provisions favoring investment assets as much as whites do.<sup>44</sup>

Moran and Whitford often write as if they were unaware that some Code provisions are intended to change behavior, not to take existing behavior for granted.<sup>45</sup> Surely national policy ought to be able to encourage investment in financial assets rather than consumption—that is, to encourage savings—without a charge that the policy discriminates against blacks.<sup>46</sup> If black Americans aren’t investing as much as whites in tax-favored assets, even when adjusting for income and wealth levels, black Americans are voluntarily forgoing tax benefits available to them. Rejecting the incentives of national policy isn’t subordination; it’s choice.<sup>47</sup>

The most fundamental problem with the Moran-Whitford study is that, as far as I can tell, it leads to nothing but despair. Moran and Whitford couple their charge of “systematic racial subordination” with the following disclaimer: “[W]e want to make clear that we are not asking a question about discriminatory intent. . . . [L]egislators are largely unaware of the Internal Revenue Code’s impact on

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42. *Id.* at 757.

43. *Id.* at 768.

44. Some of the Moran-Whitford illustrations are silly. For example, they suggest that “[d]epreciated properties, such as cars and real estate in inner city slum neighborhoods, are disfavored if they are capital assets because a taxpayer is often unable to deduct losses resulting from these properties.” *Id.* at 762 (citing sections dealing with deductibility of capital losses). If the assets are held for personal purposes, routine losses aren’t deductible for anyone, black or white. Unless I’m mistaken, the cars of whites—even suburban whites—don’t increase in value over time, yet white taxpayers aren’t entitled to take any loss deduction on sales of personal cars.

45. They aren’t really unaware of this, of course, *see id.* at 802 (discussing incentive effects), but their extended criticism generally ignores incentive effects.

46. Moran and Whitford state, “The lifestyles that blacks lead today may be the lifestyles that whites lead tomorrow. If whites want to keep the Internal Revenue Code best serving their interests, they must pay attention to how the Code ill serves blacks.” *Id.* at 802 n.176. But Congress has no intellectually justifiable reason to be indifferent to lifestyles that do not promote an acceptable level of national saving. National policy ought to ensure that excessive consumption does not become the lifestyle of any significant part of the population.

47. In any event, speaking in group terms, black versus white, misstates the nature of the behavior involved. *Group* decisions aren’t being made; the group data reflect the aggregation of *individual* choices.

blacks."<sup>48</sup> But I'd almost prefer a statement that the discrimination is intentional; then we could imagine doing something about it.

If racial subordination is really so pervasive that it exists even when legislators are drafting facially neutral tax statutes, with the best of intentions, what in the world are people of good will to do? Indeed, can there be any people of good will?

Moran and Whitford do provide specific recommendations for change, ones that a hypothetical Black Congress might enact, but those changes make little sense without an analysis of the racial effects of the Code as a whole.<sup>49</sup> Moran and Whitford say they "believe that this ignorance is one of the reasons for structural racial subordination in America,"<sup>50</sup> but they aren't really advocating a research and educational campaign. Instead the remedy for ignorance is apparently to elect more blacks to Congress: "We suggest that the Code reflects systematic black political underrepresentation in the halls of power."<sup>51</sup> That's not a statement about principle, about *law*. It's about power, and even then it's academic in the worst sense. Obviously there will never be enough blacks in Congress to enact the legislation of the Moran-Whitford Black Congress.<sup>52</sup> The remedy is therefore—nothing?

Moran and Whitford make it all sound hopeless, but I'm glad to say they aren't convincing. Despite their gloom, we aren't yet at the point where the law doesn't matter.<sup>53</sup>

### B. *Handelman on Feminist Statutory Interpretation*

Professor Gwen Handelman has posited some feminist principles that, she says, ought to guide interpretation of the Internal Revenue

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48. Moran & Whitford, *supra* note 23, at 758.

49. See Zelenak, *supra* note 22, at 1561-74. Moran and Whitford recognize that, by focusing on only a few Code provisions, their article may be incomplete, but they go ahead to test "our method," see Moran & Whitford, *supra* note 23, at 754, as if a method that tests incomplete data might nonetheless be valid.

50. Moran & Whitford, *supra* note 23, at 758.

51. *Id.* at 801.

52. If it could happen, we presumably would have disproved the subordination-is-everywhere thesis of critical race theory.

53. In a widely noted 1984 essay, Paul Carrington questioned the foundations of the critical legal studies movement, and I suggest that one of his conclusions applies to critical race theorists as well: "One cannot believe in the worth of one's professional skill and judgment as a lawyer unless one also has some minimal belief in the idea of law and the institutions that enforce it." Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 226 (1984); see also *id.* at 227 ("More than a few lawyers lack competence because they have lost, or never acquired, the needed confidence that law matters.").

Code and the Treasury Regulations that explicate the Code.<sup>54</sup> "It may be time for the bar," she writes, "and particularly tax lawyers whose work is at the heart of the democratic process, to hear and sometimes speak in a different voice."<sup>55</sup>

Handelman's interpretive principles are intended to limit the extent to which tax lawyers can recommend aggressive return positions to their clients. "[P]rivate practitioners, who are not politically authorized decisionmakers, should constrain interpretation of a tax statute to the meaning assigned by decisionmakers who have political authority: legislative, judicial or administrative,"<sup>56</sup> rather than developing their own imaginative—and overly aggressive—interpretation of a provision.

Although deferring to political decisionmakers has a statist ring to it, as Handelman recognizes,<sup>57</sup> this is a defensible beginning interpretive principle. It is, in some respects, a public-spirited conception of a lawyer's responsibilities. The law doesn't merely provide a few prohibitions beyond which anything goes; it sets—or should set—standards higher than a client's narrow, selfish interests would dictate.<sup>58</sup>

But by itself the Handelman proposal is hardly a striking innovation.<sup>59</sup> Nor is her suggestion that historical analysis should guide the inquiry into meaning: "A careful inquiry into historical fact, motivated by a genuine desire to grasp the communication represented by legislation, offers the best chance for ascertaining how those who crafted it would have wanted the statute to apply in circumstances not expressly provided for or perhaps not even specifically contemplated."<sup>60</sup> That means, I take it, that original understanding, as well as we can discern it, should guide our present understanding of a statute or regulation. To which I say, Hear! Hear!<sup>61</sup>

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54. See Gwen Thayer Handelman, *Sisters in Law: Gender and the Interpretation of Tax Statutes*, 3 UCLA WOMEN'S L.J. 39 (1993).

55. *Id.* at 76.

56. *Id.* at 53.

57. "I concede considerable unease with the degree of deference to political authority that I prescribe. . . . Is the different voice that has found expression in my work the voice of submission?" *Id.* at 63.

58. See *id.* at 60.

59. I don't mean to suggest that's a bad thing, as I've already noted, since much that is really new or striking in political-legal matters is often nonsense.

60. Handelman, *supra* note 54, at 55.

61. Lest I seem simple-minded in the extreme, I want to emphasize that legal and other developments may make applying original understanding impossible. For example, I don't advocate invalidating the use of paper money, even though the Constitution fairly

What makes the Handelman position “new” is using feminist language to justify and further develop these principles.<sup>62</sup> “[M]en and women might approach the reading of tax statutes differently,”<sup>63</sup> and that difference affects the way we should approach interpretation. Trying to understand the “communication” represented by a statute or regulation, she writes, “is an exercise in empathic understanding, stepping into the shoes of the drafter and assessing what the words mean from that viewpoint.”<sup>64</sup>

Empathic understanding is a feminine skill: “[S]tatutory interpretation as conversation may resonate with women’s experience but is the stuff of fantasy (or nightmare) to men. The nature of the male orientation and its position of dominance in American society makes it more difficult for men to recognize a reality other than their own.”<sup>65</sup> Not impossible—“men are not entirely incapable of attentiveness to others and empathic understanding if not demanded in a context that requires that they assume a one-down position”<sup>66</sup>—but difficult.<sup>67</sup>

Whew! I guess that means that anything I say on the subject should be discounted, but, with some trepidation, I’ll go ahead anyway. For one thing, I’m inclined to giggle at the thought of “empathic understanding” helping to understand municipal bond arbitrage provisions or continuity-of-interest regulations.

But that cute point aside, think about how the Handelman analysis would play out in the real world. Historically nearly all drafters of statutes and regulations were male. It may be difficult “for men to recognize a reality other than their own,” but the voices we’re trying to hear and understand in tax law are more likely to be basses than sopranos. The reality we’re trying to discern—if we have to use this distasteful language at all—is a male reality.

Is Handelman suggesting that women are better than men at

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clearly does not permit such currency. See Erik M. Jensen, *The Meaning of “Direct Taxes”*: Are Consumption Taxes Constitutional?, 97 COLUM. L. REV. 2334, 2417-19 (1997) (discussing, among other things, the *Legal Tender Cases*).

62. In an earlier article, Handelman had not adopted an explicitly feminist orientation to her recommendations. See Gwen T. Handelman, *Zen and the Art of Statutory Construction: A Tax Lawyer’s Account of Enlightenment*, 40 DEPAUL L. REV. 611, 613-15 (1991).

63. Handelman, *supra* note 54, at 41.

64. *Id.* at 55.

65. *Id.* at 68.

66. *Id.* at 72.

67. This “approach to statutory interpretation requires interpreters to engage in conduct that may be extremely emotionally difficult for men.” *Id.* at 69.

understanding what *men* were getting at when they drafted tax provisions? Men and women think differently—that's the premise of the enterprise—but women are better at understanding benighted male thinking patterns than men are?<sup>68</sup> To say the least, I'm skeptical. If we're really trying to understand gender-based thinking, which in this case must mean male thinking, I believe I'd hire a male tax lawyer to do my work. Why compensate a woman for the extra time (and agony) required to put herself into the mind of a male?

Of course, in most cases we can't actually talk to the drafters to discern statutory or regulatory meaning: using a legislator's or staff person's post hoc rationalizations for a provision isn't an often-followed (or permitted) method of interpretation. So the "empathic understanding" that must be used in Handelman's scheme, as we participate in the "communication" or "conversation" that she describes, is necessarily far removed from what it might be in a one-on-one context. Indeed, if we're interpreting older statutes and regulations, we might very well be trying to empathize with drafters who are long since dead.

What does "empathic understanding" mean under those circumstances other than trying to understand a *text*?<sup>69</sup> Maybe women are superior to men at reading texts, but I'd like to see some evidence to support that proposition.<sup>70</sup> In any case, it's hard to see what "empathic understanding" has to do with it.

Now, obviously Handelman can't mean that men and women think in ways that are so fundamentally different that communication is impossible. And in discussing communitarian ideals—men are individualistic, women are communal, and communal is better<sup>71</sup>—Handelman stresses that coming to agreement on the meaning of statutory and regulatory provisions is desirable: "[F]or a national community to endure, the unifying energy of the federal income tax

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68. I think all Handelman was saying in the passages quoted above, *see supra* text accompanying notes 63-67, is that women try harder to empathize with men than men try to empathize with women. It's quite a step from that proposition to conclude that women are better at understanding what men mean than men are.

69. "Text" need not mean "disembodied text," *see Handelman, supra* note 54, at 65, if that term is intended to suggest that history, purpose, and context should be ignored. I mean only to distinguish a written product from the sort of real conversation in which participants can derive meaning from nonverbal signals.

70. Carol Gilligan's studies, which deal with interpersonal relations, not textual interpretation, are hardly appropriate evidence for this purpose. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982), *discussed in Handelman, supra* note 54, at 47-49; *see also* Zelenak, *supra* note 22, at 1560-61 (discussing the irrelevance of Gilligan's analysis).

71. *See Handelman, supra* note 54, at 58.

must be preserved."<sup>72</sup>

All of which suggests that different readings for different parties isn't the goal, and a good thing too. Accepting the idea that principles cannot be divorced from the adherents of those principles—or that statutory meaning depends on the sex of the interpreter—would lead to the end of serious discourse, and of law itself. "Focusing on the tax system as a means to strengthen the community," writes Handelman, "I am fearful of the disintegrating effects of an 'every-man-for-himself' approach to statutory ambiguity."<sup>73</sup> I agree with that point, but I am no less concerned about an every-gender-for-itself approach to interpretation.

Professor Handelman's basic interpretive principles have merit, but the feminist rhetoric doesn't strengthen her case and it will bring her few readers from the tax bar.<sup>74</sup> The presentation of her theory may appeal to law review editors and other academics—surely that's the purpose of the enterprise—but that's not the ultimately dispositive audience for a theory of statutory interpretation.

### C. McCaffery and Taxing Women

In his new book *Taxing Women*,<sup>75</sup> Professor Edward McCaffery has expanded some ideas that he had previously advanced in the law review literature about gender discrimination. Such discrimination is built—often intentionally, he argues—into the Internal Revenue Code, but tax profs focus instead on the narrow technical stuff.<sup>76</sup> We've worn blinders: "The mainstream tax policy academy legitimated the structure of tax with a rhetoric of fairness, neutrality,

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72. *Id.* at 56-57; see also *id.* at 57 ("Revenue is essential to the practical success of efforts to address common problems; the process of revenue collection can *also* identify and create commonalities." (emphasis added)).

There already may be more common thinking about the extent to which the tax code should be used to reach redistributive justice than Handelman supposes—or wants. See William J. Turner et al., *Redistributive Justice and Cultural Feminism*, 45 AM. U. L. REV. 1275, 1315 (1996) (concluding "that there is little difference between women and men in their attitudes toward major redistributive justice issues involving tax fairness and social spending").

73. Handelman, *supra* note 54, at 61.

74. See Caron, *supra* note 1, at 526-27 (noting the relatively small number of female tax lawyers). Another article that contains fascinating insights that then get lost in a feminist haze is Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987). The feminist orientation clearly gives the article a mystique it would otherwise not have. But it also makes it something to be read largely by the converted.

75. MCCAFFERY, *supra* note 18.

76. See *supra* text accompanying note 17.

and common sense.”<sup>77</sup> And we’ve put blinders on our students: “The typical tax student, like politicians, scholars, and most Americans, simply never sees the issues.”<sup>78</sup>

Apparently no one has been paying attention: “Americans generally are not seeing the biases and the inequities of tax. The illusion of neutrality is clouding our vision.”<sup>79</sup> In short, “a large part of the obscurity of gender injustice in tax is due to the technical veneer of the laws.”<sup>80</sup>

It’s nonsense, of course, to suggest that the American population has been taken in by an “illusion of neutrality.” To whom has McCaffery been talking?<sup>81</sup> What he must mean is that things are even worse than people thought—very bad indeed—and that we’ve underestimated the extent of some particular abuses, like gender discrimination.

McCaffery’s big point is striking: “It was with the more or less conscious idea of [wives and mothers as] essentially and ideally domestic, as stay-at-home mothers, that major elements of the tax law were created.”<sup>82</sup> When coupled with the historic norm that women should stay at home, Code provisions such as those for joint filing have “the effect both of leading married persons to think in terms of a primary and an at least potentially secondary earner, and of then heavily taxing that secondary earner’s work outside the home.”<sup>83</sup>

It works like this: When the lesser-earning spouse, generally the

77. MCCAFFERY, *supra* note 18, at 1.

78. *Id.* at 42.

79. *Id.* at 77.

80. *Id.* at 96.

81. McCaffery elaborates:

Once we have come to see that tax is unavoidably and pervasively political, and has in fact been used consciously and unconsciously in the service of particular political causes all along, we will be well on our way toward a better, deeper understanding of the life we are living. . . . Tax is political in spades. It is time we faced up to this fact.

*Id.* This is news? The danger with the emphasis on law as politics is that some folks quickly move to the idea that law is nothing but politics. I’ve discussed that problem in Erik M. Jensen, *Pragmatic Instrumentalism and the Future of American Legal Education*, in *PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS: Festschrift for Robert S. Summers* (Werner Krawietz et al. eds., 1994). See also ROBERT SAMUEL SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 271 (1982) (“Law, after all, is not religion, not physics, and not just an applied social science. Law is law.”).

82. MCCAFFERY, *supra* note 18, at 3. “The tax system is marginalizing women and helping to keep them at home.” *Id.* at 73.

83. *Id.* at 69.



wife, is deciding whether it makes economic sense to work outside the home, the family thinks of her income as extra income, as marginal dollars—hence the “secondary earner” label. Her income therefore seems to be taxed at the relatively high marginal rate applicable to the couple’s combined income. Evaluated that way, and with all the other expenses of going to work, leaving home often doesn’t make economic sense.<sup>84</sup>

A lot can be said for that analysis, and—although my comments may occasionally suggest otherwise—I admire *Taxing Women* a great deal. But the book also evidences the excesses of the New Criticism: McCaffery’s rigor is sometimes overwhelmed by the desire to be provocative. At times McCaffery makes the tax system sound like a conspiracy.<sup>85</sup> The legislators know what they’re doing: “We see an explicit decision to reward the Traditionals, a conscious desire to get working wives back in the home, and a deliberate use of familial rhetoric to facilitate transfers of resources to relatively wealthy men . . . .”<sup>86</sup> But the poor benighted victims, American women, don’t realize what is happening to them because of the “obscurity of tax.”<sup>87</sup> And the voices of critics have, in the past at least, been suppressed.<sup>88</sup>

Furthermore, McCaffery peppers his commentary with jargon that will turn off all but the already converted. His favorite word must be “gendered,” as in “[g]endered tax laws have arisen out of gendered times,”<sup>89</sup> “the gendered logic of tax,”<sup>90</sup> “the gendered basis of tax,”<sup>91</sup> and so on. “Patriarchy” comes along fairly often, too. For example: “Women are learning how to work within a structure laid down in a prior era of entrenched patriarchy . . . .”<sup>92</sup> I’m sorry, but that language benefits dentists—from all the teeth-gnashing—more than it helps reasoned discourse.<sup>93</sup>

McCaffery’s ultimate recommendation is to tax men at higher

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84. The Code “leads to massive discrimination against women . . . because of its behavioral and dynamic effects, that is, the way it shapes women’s choices over time.” *Id.* at 25.

85. Even more so than Moran and Whitford, who say they view legislators as ignorant, not necessarily badly motivated. *See supra* text accompanying notes 48, 50.

86. MCCAFFERY, *supra* note 18, at 101.

87. *Id.* at 102.

88. *See id.* at 165 (noting “the suppression of their voices [early feminist tax critics Grace Ganz Blumberg and Pamela K. Gann] in the mainstream analysis”).

89. *Id.* at 22.

90. *Id.* at 166.

91. *Id.* at 167.

92. *Id.* at 4; *see also id.* at 269 (noting that women “must work on terms and conditions shaped by the forces of a patriarchal society”).

93. *See* Hochschild, *supra* note 20, at 417.

rates than women, so as to accept reality—women are more likely to be secondary earners—and to turn around the incentives that now exist in the Code. For example, “married men should be taxed more than married women, because men are less elastic”<sup>94</sup>—which means that their decisions about work are less influenced by tax effects, not that their muscles and joints are becoming brittle.<sup>95</sup> Men should be taxed “just exactly to the point where their behavior becomes as sensitive to the effects of the tax as everyone else’s behavior is.”<sup>96</sup>

This idea is probably more a rhetorical flourish than a serious policy proposal; McCaffery doesn’t expect it to be enacted.<sup>97</sup> But the *idea* is not intentionally satirical.<sup>98</sup> Since McCaffery wants it to be seriously considered, I’ll do so for a moment.

It’s more than a little peculiar, as McCaffery recognizes, to complain about incentives to keep women at home and then to recommend a taxing scheme that explicitly treats women as if they were generally the secondary earners.<sup>99</sup> If the goal is to change perceptions, I can’t imagine any policy less likely to do that.

Anyway, we obviously can’t adopt different tax schemes for men and women in such a blatant way. So, McCaffery argues, “the recommendation can, and indeed should—at least in part for Constitutional reasons—be couched in gender-neutral terms. We should tax primary earners more, and secondary earners less.”<sup>100</sup> But given that the whole of *Taxing Women* is an analysis of how things really are—how the superficial neutrality of the tax laws should give way to realistic analysis—this suggestion to “finesse constitutional norms”<sup>101</sup> in such an obvious way is extraordinarily naive.

94. MCCAFFERY, *supra* note 18, at 177.

95. Although they are, as I can attest.

96. MCCAFFERY, *supra* note 18, at 193.

97. *See id.* at 278.

98. *See id.* at 200. One quasi-satirical article advocating different tax treatment for men and women is Susan Ellingwood, *A Broad Deduction*, NEW REPUBLIC, Apr. 28, 1997, at 50 (citing McCaffery). But not all such proposals are intended to be funny. *See, e.g.*, JUNE STEPHENSON, MEN ARE NOT COST-EFFECTIVE: MALE CRIME IN AMERICA (1995). Stephenson seriously and ponderously argues for the imposition of a \$100 annual tax on each male, to make up for the costs male crime imposes on society. *See id.* at 360-62. Perhaps Stephenson’s biggest crime scoop is that “young men . . . are the likely litterers.” *Id.* at 156. You name it; men do it and then drop their gum wrappers.

99. *See* MCCAFFERY, *supra* note 18, at 21 (“However distasteful and gendered this fact might be, . . . not seeing that women are far more likely to be the secondary earners will blind us to a very large set of problems.”).

100. *Id.* at 277; cf. Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 770-74 (1988) (discussing “primary caretaker” rule in child custody).

101. Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination*,

At bottom, the critical problem with McCaffery's construct—as intriguing as it often is—is that it tries to remedy more than it possibly can. In looking for villains, as many New Critics do, McCaffery gives too much blame to the Internal Revenue Code for women's staying at home and not nearly enough blame to society's norms. Tax lawyers tend to think taxation drives everything, but there's no *tax* reason why a family has to treat mom's outside-the-home income as secondary.

Nor does McCaffery give adequate credit to the conflicting desires of women. He states that nearly all working mothers are unhappy: "Full-time workers wish they could work part time, to have more time with their children; part-time ones wish they could work full time, to get better, perhaps more dignified jobs."<sup>102</sup> How can any generally applicable tax policy take care of such inconsistent desires, even if we make the questionable assumption that fulfilling "desires" should be the goal of public policy? Different feminists want different things<sup>103</sup>—better work, better support for stay-at-home child-rearing—and, as Professor Zelenak notes, "Rather than being motivated by sexism, Congress may be making a good faith effort to address a feminist dilemma."<sup>104</sup> Bad policy—if that's what it is—is not necessarily badly motivated policy.

### III. CONCLUSION

We ought to be able to evaluate the merits of legal policy without using trendy (and divisive) language, conspiratorial theories, otherworldly standards, and all the rest of what too often is represented by the New Criticism. Each of the works I've examined makes good points, but most tax-sophisticated readers will soon conclude that it's too hard, and too unpleasant, to separate the praiseworthy from the bombastic. If this is what it takes for tax pros to feel connected to the rest of the academy, please close my office door on the way out.

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*Market Efficiency, and Social Change*, 103 YALE L.J. 595, 662 (1993).

102. MCCAFFERY, *supra* note 18, at 247.

103. Different *people* want different things. There's no market failure just because wants aren't satisfied. I want a Jaguar for \$10,000, but I can't get one. So?

104. Zelenak, *supra* note 22, at 1540.